

ESTTA Tracking number: **ESTTA523670**

Filing date: **02/26/2013**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	Vuly Pty Ltd
Granted to Date of previous extension	02/27/2013
Address	95 Ingleston RoadWakerley Queensland, 4154 AUSTRALIA

Attorney information	Jeffrey H. Greger Lowe Hauptman Ham & Berner, LLC 2318 Mill Rd Suite 1400 Alexandria, VA 22314 UNITED STATES jhgreger@ipfirm.com, kbaird@ipfirm.com Phone:703-684-1111
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Applicant Information

Application No	85636667	Publication date	10/30/2012
Opposition Filing Date	02/26/2013	Opposition Period Ends	02/27/2013
Applicant	Defy Gravity, LLC 10421 Portal Rd. LaVista, NE 68128 UNITED STATES		

Goods/Services Affected by Opposition

Class 041. First Use: 2012/01/00 First Use In Commerce: 2012/01/00
All goods and services in the class are opposed, namely: Entertainment services, namely, providing indoor amusement, sports, and trampoline facilities

Grounds for Opposition

False suggestion of a connection	Trademark Act section 2(a)
Priority and likelihood of confusion	Trademark Act section 2(d)

Mark Cited by Opposer as Basis for Opposition

U.S. Application/Registration No.	NONE	Application Date	NONE
Registration Date	NONE		
Word Mark	DEFY GRAVITY CHALLENGE		
Goods/Services	TRAMPOLINE COMPETITION SERVICES		

Attachments	Opposition.pdf (9 pages)(343633 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/JEFFREYHGREGER/
Name	Jeffrey H. Greger
Date	02/26/2013

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of U.S. Application Serial No. 85/636,667

Mark: DEFY GRAVITY and Design



Publication Date: October 30, 2012

VULY PTY LTD.

Opposer,

v.

DEFY GRAVITY LLC

Applicant

Opposition No.: _____

OPPOSITION TO APPLICATION

COMES NOW Opposer, Vuly Pty. Ltd., a legal business entity formed under the laws of Australia, with a principal place of business located at 95 Ingleston Road, Wakerley, Queensland, 4154, Australia, believing that it is being damaged by Application Serial No. 85/636,667, hereby opposes same on the following common grounds.

Facts Common to All Counts

- 1 Applicant, Defy Gravity, LLC is a limited liability company formed under the laws of Nebraska, with a business address of 10421 Portal Rd., LaVista, Nebraska, 68128 (hereinafter also referred to as "Applicant").
2. Applicant is the owner of pending U.S. Trademark Application serial number 85/636,667



which covers the mark (DEFY GRAVITY and Design) for services in International Class 41 identified as:

"Entertainment services, namely providing indoor amusements, sports, and trampoline facilities."

(hereinafter application 85/636,667 is also referred to as the '667 application).

3. Opposer, Vuly Pty. Ltd. is a legal business entity formed under the laws of Australia, with a principal place of business located at 95 Ingleston Road, Wakerley, Queensland, 4154, Australia. (hereinafter also referred to as Opposer).
4. Applicant's '667 application was published for opposition on October 30, 2012 and Opposer timely filed extensions of time for opposition requiring formal opposition to be filed by February 27, 2013. This opposition is timely filed.
5. The '667 application was filed under Section 1(a) of the Lanham Act on May 28, 2012 and asserted a first use date of the mark DEFY GRAVITY and Design at least as early January 2012.

6. On information and belief Applicant did not commence use in commerce of the mark DEFY GRAVITY and Design in connection with the services identified in its '667 application prior to 2011.
7. On information and belief Applicant did not commence advertising the mark DEFY GRAVITY and Design earlier than March 11, 2011, the date Applicant obtained the domain name address defygravityusa.com.
8. Opposer, before the Applicant's trademark application filing date of May 28, 2012, commenced use of the mark DEFY GRAVITY CHALLENGE as a trademark/service mark in commerce in the United States in connection with entertainment services in the field of trampoline competitions.
9. Opposer commenced use of the mark DEFY GRAVITY CHALLENGE at least as early as during year 2010, as a trademark/service mark in commerce in the United States in connection with entertainment services in the field of trampoline competitions.
10. Opposer has promoted the mark DEFY GRAVITY CHALLENGE in the United States in connection with trampoline competitions where consumers in the United States have participated in Opposer's trampoline competitions through the submissions of videos responding to promotions made by Opposer.
11. On information and belief Applicant through its principal or principals had knowledge of Opposer's use of the service mark DEFY GRAVITY CHALLENGE prior to adopting the similar service mark DEFY GRAVITY and Design.
12. United States residents have participated in Opposer's DEFY GRAVITY CHALLENGE brand competitions over the last three years.

13. Opposer's sport competition service uses the mark DEFY GRAVITY CHALLENGE and the mark is promoted internationally to experienced athletes in the field of trampolines and gymnastics including within the United States.
14. Opposer's sport competition service mark is also promoted to amateur sports enthusiasts and consumers in the United States who also use the trampoline-related sports entertainment services provided by Opposer.
15. Prizes are awarded each year in different categories including a professional category open to international athletes including athletes who participate in the United States.
16. United States athletes and gymnasts have been competing in Opposer's DEFY GRAVITY CHALLENGE for the past three years.
17. Based on Opposer's uses of the mark DEFY GRAVITY CHALLENGE in the United States, consumers of Opposer's products and services have come to associate the mark DEFY GRAVITY CHALLENGE with the Opposer.
18. Opposer has established common law rights in the mark DEFY GRAVITY CHALLENGE based on use of the mark in connection with trampoline-related sports and entertainment services provided to United States consumers residing throughout the United States.
19. On information and belief consumers and athletes throughout many states in the United States have been exposed to advertising materials and promotional use of Opposer's DEFY GRAVITY CHALLENGE service mark for at least the past three years.
20. On information and belief consumers and athletes throughout many states in the United States have directly participated in Opposer's DEFY GRAVITY

CHALLENGE trampoline competition over the past three years dating back to year 2010.

21. On information and belief Applicant was not in existence prior to December 14, 2010.
22. On information and belief Applicant has no common law rights based on actual use of the mark DEFY GRAVITY and Design which predates December 14, 2010.
23. On information and belief Applicant has no common law rights based on actual use of the mark DEFY GRAVITY and Design which predates March 29, 2011.
24. On information and belief consumers and athletes throughout many states in the United States have used the entertainment services pertaining to Opposer's DEFY GRAVITY CHALLENGE trampoline competition over at least the past three years and prior to December 14, 2010.
25. On information and belief, Applicant has limited common law rights in the State of Nebraska and the geographic surrounding area of La Vista, Nebraska for its uses of the applied for mark DENY GRAVITY and Design.
26. On information and belief, Opposer's common law trademark rights in its DEFY GRAVITY CHALLENGE service mark are superior in time to the Applicant's common law rights based on use of its DEFY GRAVITY and Design mark.
27. On information and belief, Opposer's common law trademark rights in its DEFY GRAVITY CHALLENGE service mark are broader in geographic scope of use to the Applicant's common law rights based on use of its DEFY GRAVITY and Design mark.
28. On information and belief consumers in the state of Nebraska used Opposer's entertainment services in connection with Opposer's DEFY GRAVITY

CHALLENGE mark prior to Applicant's first use of the mark DEFY GRAVITY and Design anywhere in the United States.

COUNT I – LIKELIHOOD OF CONFUSION – 15 U.S.C. §1052(d)

29. All prior allegations are incorporated herein by reference.
30. Applicant's mark DEFY GRAVITY and Design as applied-for comprises the terms DEFY GRAVITY as the word portion of the mark.
31. The word mark DEFY GRAVITY is identical to the word mark DEFY GRAVITY as used by Opposer in its service mark DEFY GRAVITY CHALLENGE for sports competition services.
32. Applicant's '667 application seeks coverage for entertainment services in Class 41 namely providing trampoline services and indoor amusements and sports.
33. On information and belief Applicant's trampoline services are promoted to and used by similar consumers that participate in Opposer's trampoline-related competition services and which use Opposer's entertainment services related to its trampoline competition.
34. On information and belief Applicant promotes its trampoline-related entertainment services using the internet.
35. On information and belief Applicant's promotes its trampoline-related entertainment services using similar trade channels and Applicant's services are marketed and advertised in similar ways as Opposer's trampoline-related products and services.
36. On information and belief consumers of Applicant's services confronted with Applicant's trampoline-related services as listed in the '667 application in the normal channels of trade for such services are likely to be confused as to source, sponsorship, or affiliation with Opposer as a source indicia in view of use of DEFY GRAVITY

CHALLENGE previously advertised and used by Opposer in the sports competition field.

37. On information and belief consumers are likely to be confused that services offered by Applicant and/or as likely to be expanded by Applicant in connection with the DEFY GRAVITY and Design mark as appears in the '667 application, are authorized, sponsored or affiliated by the Opposer, when no such authorization or affiliation exists.
38. If the '667 application is permitted to mature to registration, the existence of the registration on the Principal Register of the USPTO will provide the Applicant with *prima facie* evidence of the exclusive rights to use the mark "DEFY GRAVITY" including a natural zone of expansion of exclusive rights, despite Applicant not being the primary source or indicia of the brand associated with the mark in connection with trampoline-related services.
39. Registration of the mark DEFY GRAVITY and Design as appears in the '667 application will cause consumer confusion with respect to trampoline services and sporting competitions pertaining to trampolines and harms the good will established with respect to Opposer's DEFY GRAVITY CHALLENGE mark.

COUNT TWO – False Association under 15 U.S.C. §1052(a)

40. Opposer incorporates by reference all prior allegations.
41. On information and belief Applicant's uses of its mark DEFY GRAVITY and Design mark in connection with the services identified in its '667 application is likely to falsely suggest a connection with Opposer when no such connection or affiliation actually exists.

42. If the USPTO grants Applicant a *prima facie* right to use the mark DEFY GRAVITY and Design by virtue of maturing the '667 application, Opposer's good-will which has been built by Opposer in its DEFY GRAVITY CHALLENGE service mark, will be damaged by a false association with Applicant, thereby resulting in harm to Opposer.
43. If the USPTO grants Applicant exclusive rights to use the mark DEFY GRAVITY and Design by virtue of maturing the '667 application, Applicant can claim a false association and attempt to prevent Opposer from continued use of Opposer's DEFY GRAVITY CHALLENGE service mark despite Opposer's prior use rights, thereby creating a cloud over Opposer rights in its DEFY GRAVITY CHALLENGE service mark in the United States including expanding said rights within a natural zone of expansion.

Wherefore, Opposer believes that it will be damaged by a registration for the mark as appears in the '667 application and therefore prays that this Opposition be sustained in favor of the Opposer; that judgment be entered against the Applicant; and that U.S Trademark Application Serial Nos. 85/636,667 be refused.

Opposer submits the applicable filing fee of \$300 with this Opposition filing to cover the single class application opposed.

Respectfully submitted,
LOWE HAUPTMAN HAM & BERNER, LLP



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Attorney for Applicant,

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Certificate of Service

I hereby certify that a copy of the foregoing OPPOSITION shall be forwarded to Applicant's currently listed correspondence address and contact information according to the current records as contained in the U.S. Patent and Trademark Office records as appears below, by prepaid United States mail on the 26th day of February, 2013

Annette P. Heller
Heller & Associates
Suite 400
400 Chesterfield Ctr.
Chesterfield, Missouri
63017
Email: tmattorneypto@aol.com

Dated: _____

2/26/13

Jeffrey H. Greger